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CASE NO. 85-1359

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

C.L. NORVELL, Sheriff, St. Lucie Jail, DR. BARBARA GREADINGTON, Commissioner, FPPE, and LOUIE L. WAINWRIGHT, Secretary, Department of Corrections,

Petitioner,

vs.

RICHARD MILLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

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33pp

QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeal correctly held that Section 713.34(3), Fla. Stat. (1979) is unconstitutional on its face and as applied to Respondent.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Constitutional Provisions	1
Florida Statute Involved	2
Statement of the Case	2 - 5
Reasons for Denying the Writ	6 - 13

THE ELEVENTH CIRCUIT COURT OF APPEAL CORRECTLY RULED THAT SECTION 713.34(3) FLORIDA STATUTES IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT.

Conclusion	13
Certificate of Service	13

TABLE OF AUTHORITIES

CASES	PAGE
Barnes v. United States, 412 U.S. 837 (1973)	6,12
County Court of Ulster County v. Allen 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)	6,7,9
Crowley v. Christian, 137 U.S. 86 (1981)	11
Francis v. Franklin, 105 S.Ct. 1971	7,9,10, 11,12,13
In re Winship, 397 U.S. 364 (1970)	6,7
Miller v. Norvell, et al., 775 F.2d 1572 (11th Cir. 1985)	1,8,10, 11-12
Minnesota v. Barber, 136 U.S. 313 (1890)	10
Mullaney v. Wilbur, 421 U.S. 698-701, 95 S.Ct. at 1889-1890	8,10,13
Patterson v. New York, 432 U.S. 197 (1977)	7,8
Sandstrom v. Montana, 444 U.S. 510 (1979)	7,11, 12,13
State v. Chambers, 709 P.2d 321 (Utah 1985)	12
State ex rel. Moore v. Woods, 420 F.2d 1260, 1262 (7th Cir. 1970)	11
State v. Ferrari, 398 So.2d 804 (Fla. 1981)	8-10
Woods v. Holy Cross Hospital, 591 F.2d 1164, 1171 (5th Cir. 1979)	11
OTHER AUTHORITIES	
Florida Statutes	
§713.34(3) (1979)	2,7,11, 12-13
United States Constitution Amendment XIV	1

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vs.

RICHARD MILLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

Respondent, RICHARD MILLER, hereby submits the following Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, was issued on November 15, 1985; that court denied rehearing and rehearing En Banc on December 16, 1985. Miller v. Norvell, et al., 775 F.2d 1572 (11th Cir. 1985). (See Appendix).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FLORIDA STATUTE INVOLVED

Section 713.34(3), Florida Statutes (1979) provides as follows:

> (3) Any person, firm, corporation or agent, officer or employee thereof who, with intent to defraud, shall use the proceeds of any payment made to him on account of improving certain real property, for any other purpose than to pay for labor or services performed on or materials furnished for this specific improvement, while any amount for which he may or become liable for such labor, services, or materials remains unpaid shall be guilty of embezzlement and shall be prosecuted and, upon conviction, punished in accordance with the provisions of the laws of this state; provided, however, that failure to pay for such labor, services or materials furnished for this specific improvement after receipt of such proceeds shall constitute prima facie evidence of intent to defraud.

STATEMENT OF THE CASE

Although the Statement of the Case in the Petition contains an essentially accurate review of the facts of the case, Respondent would supplement that statement with general important facts that were not mentioned. Respondent will refer to the transcripts of the trial in the same manner as the Petitioner (Tr).

Respondent, RICHARD MILLER testified in his own behalf that as President of Pointe South Builders, Inc., he entered into five (5) contracts and agreed to build homes for the five individuals pursuant to a contract. Tr.534. For these five contested cases, Respondent did not in any way alter his usual business practices. Tr.535. All the funds received from the five building contracts were deposited in the account of Pointe South Builders, Inc. The funds were used to pay the bills of Pointe South Builders, Inc. Tr.535. Respondent absolutely denied any intent to defraud anyone. Tr.526.

Respondent testified as to the Sbariscias (Count I) the down payment was placed in the corporation's operating account. Tr.537. There was no agreement or understanding with Mr. Sbariscia that the funds were to be held in trust for his property. Tr.537. No trust provision was reflected in the parties' written agreement. Tr.537. Respondent never told the Sbariscias that the funds received would be used specifically for work on his house. Tr.537. Respondent never intended to defraud

or deceive him. Tr.537. His only intent was to build the house. Tr.537-538. He never specifically told them that their home would be built in ninety days. Tr.539. This was also true of Mrs. Banke (Count III). Tr.538. All the terms and conditions of the Banke contract and construction were identical to the Sbariscias. Tr.538.

Respondent testified in regard to Mr. Vogt (Count IV) that he never intended to defraud him. Tr.539. His only intent was to complete the contract and perform according to the terms of said contract. Tr.539-540. Respondent did not represent that the funds received would be held in trust nor did the contract provide. Tr.540.

Respondent testified as to the Feshs (Count V) that he never intended to defraud them. Tr.540. His only intent was to build the home. Tr.540. As to the Lotsof's (Count II) his only intent was to build a house according to the terms of the contract. Tr.540. When Respondent stopped work on the Lotsof's home, he felt that the Lotsof's were in breach of the contract. Tr.541. Respondent did not specifically mention a ninety day completion date to her. Tr.542.

Respondent testified that with the Feshs (Count V) that he never intended to defraud them. Tr.542. His only intention was to build the home pursuant to the contract entered into between the parties. Tr.542.

Respondent stated that he went on a combined business/ vacation trip from June 24, 1979 to August 1979. Tr.542,546. The trip was not part of any scheme to defraud his customers. Tr.543. Respondent did not tell Mr. Richner to collect funds from the five people to finance his trip. Tr.557. The funds for the trip were not entirely paid for out of Pointe South Builders fund. Tr.625. The trip funds also came from his wife's funds and the proceeds of a special job. Tr.696.

At this point in time, Respondent had twelve (12) different houses under construction. Tr.547. Respondent left his supervisor, Clyde Richner in charge of the construction. Tr.546. He contacted his supervisor each week. Tr.546. Respondent informed

all his customers of his travel plans. Tr.548. It was Clyde Richner's job to maintain the construction schedule. Tr.547. During the first two weeks of his business/vacation trip everything was under control but problems developed. Tr.548. Respondent contacted his customers directly. Tr.548. Respondent made calls to subcontractors to ascertain exactly what were the causes of these construction delays. Tr.550. Respondent's sole intent was to get the homes completed. Tr.551.

In reference to Respondent's automobile, Respondent testified that his wife owned a 1979 Lincoln Continental. Tr.637. Originally Pointe South Builders purchased the car new on March 30, 1979. Tr.637. The corporation traded in its Cadillac and the bank financed practically all of the balance. Tr.638. Mrs. Miller assumed the payments on the vehicle. Tr.637.

The initial deposits Respondent received from his customers were to pay for his labor, plans and permits to commence construction of the home. Tr.687-688. Respondent testified that their money was used for specific business expenditures. Tr.767.

Respondent testified that numerous problems developed with the individual construction projects. There were problems with land fill operations. Tr.561. There were delays with the architect. Tr.571. The Lotsoff's family made unreasonable demands upon Respondent. Tr.582. Also during September, 1979, a hurricane halted construction for twenty-three days. Tr.583-584.

Respondent testified that the reason that the subcontractors and materialmen were not paid was basically because there were contract disputes. Tr.551,802. The people stopped him from building and hence were in breach. Tr.686. The non-payment of bills by Respondent was not part of any intent to defraud those people. Tr.551. All the money received was placed into Pointe South Builders checking account and used to pay bills as the corporation received them. Tr.552. As corporate bills fell due, they were paid. Tr.552. This was always Respondent's general practice even before he entered into these five contracts.

Tr.552. When Respondent signed the contracts he estimated that his profit range would be from $7,000.00 - $10,000.00 per house. Tr.554.

Respondent understood that any and all funds given to him under contract would be placed into a general operating account to pay any and all corporate bills derived from any source. Tr.559. No specific money was to be applied as such to any specific bills for any specific purpose. Tr.559. The Vogts stopped the issuance of a building permit. Tr.559.

Respondent had numerous business expenditures. Tr.768. He purchased supplies and paid the subcontractors. Tr.771. He had advertising expenses, phone bills, truck payments, vehicle maintenance and gas, the salary of Clyde Richner, and his own salary. Tr.771. Respondent's only intent when he entered into contracts and received down payments was to build the homes. Tr.822. Respondent never intended to defraud anyone by taking or using their initial deposit. Tr.816. Respondent did not "defraud" anyone. Tr.822. According to Respondent his business problems all stemmed from leaving an incompetent man, Clyde Richner, in charge of construction. Tr.824.

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY RULED THAT SECTION 713.34(3) FLORIDA STATUTES IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 364 (1970).

Two of the most fundamental features of our criminal justice system are the presumption of innocence and the requirement that the state prove each element of a crime beyond a reasonable doubt. Of course, legislatures have on occasion, passed legislation which provide that proof of an evidentiary fact can or must be construed as proof of an element of a crime charged. The effect of such legislation is the creation of a presumption that flows from the established evidentiary fact. See County Court of Ulster County v. Allen, 442 U.S. 140 (1979).

The constitutionality of the statutory presumption in a criminal statute depends "...on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." Ulster County, 442 U.S. at 156. Where a statute provides that proof of an evidentiary fact necessarily constitutes proof of an element of the crime, the statute creates a mandatory presumption that proof of the former is deemed proof of the latter. A permissive presumption is one "which allows -- but does not require -- the trier of fact to infer the [ultimate] fact from proof by the prosecutor of the [basic fact] ...." Id., at 157.

In Barnes v. United States, 412 U.S. 837 (1973), and Ulster County, the Court clarified the constitutional standards by which each type of presumption will be judged. If a presumption is permissive, the record must disclose that the presumed fact "more likely than not" flows from the underlying facts in the particular case at issue. If a presumption is mandatory, the statute is

analyzed on its face to determine whether the presumed fact flows beyond a reasonable doubt from the underlying facts. In Francis v. Franklin, ___U.S.___, 105 S.Ct. 1965 (1985), the Court held:

> Mandatory presumptions must be measured against the standards of Winship as elucidated in Sandstrom. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. Patterson v. New York, supra, at 215 ("a State must prove every ingredient of an offense beyond a reasonable doubt and...may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). See also Sandstrom, supra, at 520-524; Mullaney v. Wilbur, supra, at 698-701.

105 S.Ct. 1971

The Court also noted in Francis:

> (2) A mandatory presumption may be either conclusive or rebuttable.... A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. See Sandstrom v. Montana, 442 U.S. 510, 517-518, 99 S.Ct. 2450, 2455-2456, 61 L.Ed.2d 39 (1979).

105 S.Ct. at 1971 n.2 (emphasis supplied)

In order for a mandatory presumption to adequately safeguard the "beyond a reasonable doubt" standard, the evidentiary fact must be sufficient to prove the elemental fact beyond a reasonable doubt because the factfinder is denied any discretion to assign its own weight to the proven evidentiary fact. Also to hold otherwise would sanction an impermissible shift of the burden of proof of an element of the crime charged.

At bar, the court of appeals, relying on the Court's decision in Francis v. Franklin, supra, held that the presumption contained in §713.34(3) created an unconstitutional mandatory rebuttable presumption. Id. at 1576. This ruling is also supported by the Court's decisions in Sandstrom v. Montana, 444 U.S. 510 (1979); Ulster County, supra; Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); Barnes v. United States, supra; In re Winship, supra.

In Mullaney v. Wilbur, 421 U.S. 684 (1975) the Court explicitly held unconstitutional a mandatory rebuttable presumption that shifted to the defendant a burden of persuasion on the

question of intent. Id. at 698-701. The presumption at bar suffers from this same infirmity. As the Court later explained in Patterson v. New York, supra:

> "Mullaney surely held that a State ... may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.... Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."

432 U.S. at 215. See also Leary v. United States, 395 U.S. 6 (1969) (Statutory presumption of knowledge contained in 21 U.S.C. section 176(a) was invalid under the due process clause).

Petitioner in his brief notes that the Florida Supreme Court in State v. Ferrari, 398 So.2d 804 (Fla. 1981), held that the presumption employed by the statute is permissive and passes constitutional muster. Petitioner relies upon Ferrari to assail the court of appeals' conclusion that this same presumption was mandatory and held the statute unconstitutional. However, the Florida court's Ferrari decision is fundamentally unsound and does not control resolution of the federal constitutional question, for it is in clear violation of the principles established by this Court in assessing presumptions in criminal cases. The court was correct on two separate grounds in declining the reasoning of the state court Ferrari decision.

In State v. Ferrari, the trial court held §713.34(3), Fla. Stat. (1979), to be unconstitutional on its face holding, inter alia, that the presumption employed by the statutes is invalid. In a 4-3 decision, the Florida Supreme Court reversed, holding that the presumption contained in the statute was not unconstitutional on its face. Justice Adkins writing for the majority reasoned:

> The plain language of §713.34(3) indicates that its presumption does not bind the jury to find that the presumed fact necessarily follows the proven fact, therefore the presumption is permissive in nature....
>
> The presumption in §713.34(3) clearly affords a reasonable opportunity for rebuttal. Since the presumption is one of prima facie evidence only, the state is not totally relieved of the burden of proof. Any time after this prima facie evidence of intent is established that defendant may come forward with evidence to

> negate criminal intent, thereby destroying the presumption and shifting the burden back to the state to prove intent beyond a reasonable doubt. See, e.g., Mann v. State, 209 So.2d 472 (Fla.1st DCA 1968).

398 So.2d at 806-07.

The Florida Supreme Court did not have the benefit of the Court's decision in Francis v. Franklin when it rendered its decision in Ferrari. And Francis demonstrates the fatal flaw in the Florida court's reasoning. Just because a statutory presumption can be rebutted does not automatically turn it into a permissive presumption. Yet that erroneous premise was the foundation of the Ferrari decision. Likewise, the Ferrari court also employed a constitionally improper test in determining the validity of the presumption contained in the statute.

In Francis v. Franklin, supra, the Court explained: "A mandatory presumption may be either conclusive or rebuttable.... A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted." 105 S.Ct. at 1971 n.2. Also in Ulster County, supra, the Court explained that a permissive presumption "allows - but does not require - the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant." Id., at 157. Therefore contrary to the holding by the Florida Supreme Court, the presumption employed by §713.34(3) is mandatory and not permissive.

The presumption in §713.34(3) is mandatory because it tells the trier of fact that upon proof of the basic fact (failure to pay for such labor, services or material furnished for the specific improvement after receipt of such proceeds) it shall find the crucial elemental fact (shall constitute prima facie evidence of intent to defraud) at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. The "shall" coupled with "prima facie evidence" makes said presumption mandatory. See County Court of Ulster County v. Allen, supra; Francis v. Franklin, supra.

The Eleventh Circuit explained the fallacy of the Florida Supreme Court's decision in Ferrari as follows:

> Contrary to what the Florida Supreme Court said, the fact that a presumption does not bind a jury to find that "the presumed fact necessarily follows the proven fact" does not mean that the presumption is a permissive inference. Such a presumption could be either a permissive inference or a mandatory rebuttable presumption.

775 F.2d at 1575 (emphasis supplied).

The Court also ruled that the statutory presumption, by its use of the term "shall", "command the jury to find intent to defraud if the jury finds that funds were not applied directly to the project for which they were advanced and the defendant fails to produce evidence to rebut this finding." 775 F.2d at 1575. Hence, the language of the statute on its face created a mandatory rebuttable presumption. Therefore contrary to the holding by the Florida Supreme Court, the presumption employed by §713.34(3) is mandatory and not permissive. It follows from the above analysis that the Eleventh Circuit was not "bound" to follow the ruling of the Florida Supreme Court on this federal constitutional issue.

Moreover, whether a presumption employed by a state statute is an unconstitutional mandatory presumption proscribed by the Due Process Clause is clearly a federal question. See Francis v. Franklin, supra; Mullaney v. Wilbur, supra. The court of appeals correctly followed the Court's rulings in so holding:

> The Florida Supreme Court has held that Fla.Stat. §713.34(3) creates a permissive inference, and not a mandatory rebuttable presumption. Farrari, 398 So.2d 804. Normally, a state supreme court is the ultimate expositor of state law. Mullaney, 421 U.S. at 691, 95 S.Ct. 1886. However, when a court determines whether a statute creates a mandatory rebuttable presumption or a permissive inference, the court is directly deciding the question of whether that statute comports with federal constitutional requirements. The determination of the type of presumption a state statute creates is thus a federal question subject to review by federal courts.

775 F.2d at 1574 (emphasis supplied).

A federal court may determine in a habeas corpus proceeding the federal constitutionality of a state statute under which a defendant was convicted. Minnesota v. Barber, 136 U.S. 313

(1890). Even if a state court has determined that a state provision is valid, the federal court is only bound by the decision if it appears that the provision does not contradict some provision of the federal constitution. See Crowley v. Christian, 137 U.S. 86 (1891). Although a state supreme court's construction of state law is binding on a federal court, the federal court is not bound by the state court determinations on federal constitutional issues. Woods v. Holy Cross Hospital, 591 F.2d 1164, 1171 (5th Cir. 1979); State ex rel. Moore v. Woods, 420 F.2d 1260, 1262 (7th Cir. 1970).

The statutory presumption in §713.34(3) is unconstitutional on its face and as applied to Respondent. The presumption is an unconstitutional mandatory burden shifting presumption which does not meet the appropriate due process standards. Although not reached by the lower court, Respondent also contends that §713.34(3) is void for vagueness. Hence the Eleventh Circuit correctly applied the standards enunciated by the Court in judging presumptions in criminal statutes to declare §713.34(3) unconstitutional on its face and as applied to Respondent. For these reasons the Petition should be DENIED.

Petitioner also suggests that the court of appeals not only erred "in finding the jury instructions unconstitutional but compounded that error by deciding that because the jury instructions were unconstitutional, the statute must be unconstitutional as well."

Petitioner has obviously misread or misunderstood the holdings of this Court in the cases cited and specifically the holding of the eleventh circuit court of appeals in this cause.

The eleventh circuit court correctly applied the principles established by the Court in Francis v. Franklin, supra, and Sandstrom v. Montana, in ruling that the jury instructions given at bar based on §713.34(3) created an unconstitutional mandatory rebuttable presumption on the issue of intent by placing the burden of proof on the defendant with respect to that issue:

> A reasonable juror thus "could have understood" the instructions to require the jury to find intent to defraud, unless the defendant produced evidence to rebut that finding. Because the instructions in the present case

> could be interpreted to create a mandatory rebuttable presumption, the instructions are unconstitutional. Francis, 105 S.Ct. 1972.

775 F.2d at 1575.

Assuming arguendo a Sandstrom-Francis issue can be deemed harmless, the eleventh circuit engaged in a careful examination of the record and concluded that the "Sandstrom violation was therefore not harmless error." 775 F.2d at 1576.

Petitioner cites the case of State v. Chambers, 709 P.2d 321 (Utah 1985) noting that the state court found the jury instructions unconstitutional under Francis v. Franklin but upheld the criminal statute (UCA §76-6-402(1)) from which the language of the instruction was drawn. However, Petitioner fails to mention that the common statutory presumption contained in the Utah statute (possession of recently stolen property) has withstood numerous challenges including one by the Court in Barnes v. United States. The presumption utilized in §713.34(3), Fla. Stat. (1979) is clearly distinguishable and obviously unconstitutional.

Finally, Petitioner claims that the Eleventh Circuit Court of Appeals erred by deciding that "because the jury instructions were unconstitutional, the statute must be unconstitutional as well." Petitioner misconstrues the reasoning of the Eleventh Circuit on this point. There was no such ruling by the Court.

The Eleventh Circuit, citing Francis v. Franklin, held that the test in construing the jury instructions is not what the state supreme court declares the meaning of a jury instruction to be, but rather what a reasonable juror could have understood the charge as meaning. This is a federal constitutional question. 775 F.2d at 1574. Thereafter, in discussing the constitutionality of §713.34(3), the court of appeals noted:

> However, when a court determines whether a statute creates a mandatory rebuttable presumption or a permissive inference, the court is directly deciding the question of whether that statute comports with federal constitutional requirements. The determination of the type of presumption a state statute creates is thus a federal question subject to review by federal courts. We note that to hold otherwise would create the anomalous situation where a statute is held to be constitutional, although jury

> instructions that are merely a verbatim rendition of the statute are held to be unconstitutional.

775 F.2d at 1576 (emphasis supplied).

Accordingly, the Eleventh Circuit merely applied the established principle that it is a federal question whether a jury instruction or state criminal statute employs a presumption in violation of the Due Process Clause. Petitioner's attempt to attribute any other holding to the court of appeals is without merit. In essence, Petitioner is taking dicta from the opinion and unjustifiably characterizing it as the holding. Each issue is a federal question which can properly be resolved by federal courts.

CONCLUSION

The opinion of the Eleventh Circuit Court of Appeal in this case is entirely consistent with the decisions of this Court and review of said opinion is unwarranted. Therefore, based on the grounds and authorities cited herein, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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APPENDIX

APPENDIX

the trial judge, upon finding that inadequate record keeping made it impossible to determine if an unnecessary duplication of work existed, held that the award would be reduced by lowering the hourly rates he would have otherwise utilized. The court, however, failed to indicate how much it reduced the hourly rates. In the absence of such information we are unable to determine the reasonableness of the reduction. The district court's increase of the hourly rates to reflect the delayed payment shares the same infirmity. In *Johnson v. University College of the University of Alabama*, 706 F.2d 1205, 1210-11 (11th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983), we held that, in determining a reasonable fee, a district court must take into account the delay in payment suffered by the plaintiff. The district court in this case, although noting that "[t]he delay plaintiffs have experienced in receiving the award made here is reflected in the hourly rates discussed," never set out precisely what part of the rates represented compensation for delayed payment.[16] Thus we cannot determine whether the adjustment for delay in payment was adequate.

IV.

We hold that the law of the case doctrine does not foreclose the award of attorneys' fees for services performed prior to 1971. Accordingly, we vacate the district court's order with the instruction that the court, after making appropriate findings of fact, fashion a new award.

VACATED and REMANDED.

16. In *Johnson v. University College of the University of Alabama*, 706 F.2d at 1210-11, we suggested that one way of adjusting the fees awarded for delay in payment would be to compensate counsel at current rather than historical hourly rates. There is no indication from the district court's order that this method was used, the hourly figures arrived at by the court seem too low to be current rates, unless a larger reduction than would seem appropriate was imposed because of the inadequate record keeping. In our view, however, using current rates to account for the delay in payment is somewhat inaccurate as it assumes that the increase in legal fees mirrors that of inflation, which in many instances is not the case. A more accurate method for adjusting for delays in payment would be to apply to the award a figure which is recognized as representing the time value of money over the period of the litigation.

Richard MILLER, Petitioner-Appellant,

v.

C.L. NORVELL, Sheriff, St. Lucie County Jail, Dr. Barbara Greadington, Commissioner, FPPC and Louie L. Wainwright, Respondents-Appellees.

No. 85-5171.

United States Court of Appeals, Eleventh Circuit.

Nov. 15, 1985.

Building contractor, who had been convicted of criminal misapplication of funds, brought petition for writ of habeas corpus. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., denied petition, and contractor appealed. The Court of Appeals, Johnson, Circuit Judge, held that criminal statute prohibiting misapplication of funds, which provided that failure to spend funds as agreed upon "shall constitute prima facie evidence of intent to defraud," created unlawful mandatory rebuttable presumption of intent, and was unconstitutional both on its face and as applied to contractor.

Reversed.

1. Criminal Law ⇐277(2)

In prosecution of building contractor for criminal misapplication of funds, jury instruction that contractor's failure to spend funds properly "shall constitute prima facie evidence of intent to defraud" created unconstitutional mandatory rebuttable presumption. West's F.S.A. § 713.3463).

2. Criminal Law ⇐324

Where proven fact is not only evidence of presumed fact that is element of offense, permissive inference can be upheld only if, given that initial fact is proven, it is more likely than not that presumed fact would follow; however, where proven fact is sole evidence of presumed fact, inference can be upheld only if, given that initial fact is proven, presumed fact would follow beyond reasonable doubt.

3. Criminal Law ⇐778(2)

Even assuming that jury instruction in prosecution for criminal misapplication of funds, to effect that defendant's failure to spend funds properly "shall constitute prima facie evidence of intent to defraud," created only permissive inference on issue of intent, instruction was unconstitutional, where sole evidence of defendant's intent to defraud was fact that he received advance payments for work on various projects and did not spend funds on those specific projects. West's F.S.A. § 713.34(3).

4. Criminal Law ⇐1172.2

Error in jury charge creating mandatory rebuttable presumption can be harmless beyond reasonable doubt under two circumstances: where faulty instruction applied to element of crime not at issue at trial, or where evidence of guilt was overwhelming; in second situation, court's analysis should focus on whether evidence of presumed element, rather than more inclusive issue of guilt, is overwhelming.

5. Criminal Law ⇐778(2), 1172.2

Jury instruction in prosecution for criminal misapplication of funds, which created unconstitutional mandatory rebuttable presumption on issue of intent, was reversible error, where state offered no evidence of intent to defraud other than evidence which gave rise to unconstitutional presumption. West's F.S.A. § 713.34(3).

6. Criminal Law ⇐327

Statute that relieves state of affirmative burden of proving one of elements of offense is analyzed in accordance with same principles as jury instructions that are based on that statute.

7. Federal Courts ⇐404

While state Supreme Court is generally ultimate expositor of state law, when state court determines whether statute creates mandatory rebuttable presumption or permissive inference in criminal setting, court is directly deciding question of whether statute comports with federal constitutional requirements, and that determination is subject to review by federal courts.

8. Embezzlement ⇐2

Florida criminal statute prohibiting misapplication of funds, which provided that failure to spend funds as agreed upon "shall constitute prima facie evidence of intent to defraud," created unlawful mandatory rebuttable presumption on issue of intent, and was unconstitutional, rejecting *State v. Farren*, 398 So.2d 804.

Anthony Calvello, Asst. Public Defender, West Palm Beach, Fla., for petitioner-appellant.

Georgina Jimenez-Orosa, Asst. Atty. Gen., West Palm Beach, Fla., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FRANK M. JOHNSON, Jr., and HENDERSON, Circuit Judges, and ALL GOOD*, District Judge.

JOHNSON, Circuit Judge:

Appellant is a building contractor. During 1978 and 1979 he entered into construction contracts with five individuals for whom he agreed to build houses. All of these individuals advanced funds to appellant for use on their respective homes. Appellant failed to use this money to pay for

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

work on these houses, and work on each of them was halted.

Appellant was charged with misapplication of funds in violation of Fla.Stat. § 713.345. Fla.Stat. § 713.345(1) provides, "If any person, firm, corporation, or agent, officer or employee thereof who, *with intent to defraud*, shall use the proceeds of any payment made to him on account of improving certain real property, for any other purpose than to pay for labor or services performed on or materials furnished for the specific improvement, while any amount for which he may be or become liable for such labor, services, or materials remains unpaid shall be guilty of embezzlement and shall be prosecuted and, upon conviction, punished in accordance with the provisions of the laws of this state, *provided, however that failure to pay for such labor, services or materials furnished for the specific improvement after receipt of such proceeds shall constitute prima facie evidence of intent to defraud*." (Emphasis added.)

Appellant filed a motion to dismiss the charges on the grounds that Fla.Stat. § 713.345 was unconstitutional both facially and as applied to him, under both state and federal law. The trial judge denied this motion. Appellant was tried on March 23-28, 1980. At the close of the State's case, appellant renewed his motion, which motion was again denied. He submitted six requested jury instructions which were denied by the trial judge.

At trial, the judge instructed the jury, "Proof that the defendant failed to pay for such labor, services or materials for any specific improvement from the proceeds of any payment made to him for such specific improvements shall constitute prima facie evidence of intent to defraud. Prima facie evidence means evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose."

Appellant was found guilty on all five counts with which he was charged. He was sentenced to six months in county jail with fourteen-and-one half years' probation. Appellant's convictions were affirmed on direct appeal. *Miller v. State*, 407 So.2d 970 (Fla. 4th Dist.Ct.App.1981).

Appellant filed a Petition for Writ of Habeas Corpus in United States District Court for the Southern District of Florida on May 14, 1982. On January 13, 1985, a United States Magistrate recommended that the petition be denied. This recommendation was adopted by the district court on February 8, 1985. This appeal followed.

I. Constitutionality of the Jury Instructions

A. The *Sandstrom* Error

Appellant contends that the jury instructions based on Fla.Stat. § 713.345 created a mandatory rebuttable presumption on the issue of intent, placing the burden of proof on the defendant with respect to that issue. Appellant contends that the instructions were prohibited by *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and its progeny.

In the recent case of *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), which was decided after the district court denied appellant's petition for habeas relief, the Supreme Court said, "A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element unless the defendant persuades the jury not to make such a finding." *Id.*, 105 S.Ct. at 1972-73. The Court held that a mandatory rebuttable presumption is unconstitutional. *Id.* at 1973.

In *State v. Ferrari*, 398 So.2d 804 (Fla. 1981), the Florida Supreme Court considered the constitutionality of the presumption in Fla.Stat. § 713.345. The Florida Supreme Court held that a permissive presumption is one which allows the jury to find the presumed fact once the basic fact is proven, but does not require such a finding by the jury. *Id.* at 806.

The court then held that the presumption in Section 713.31(3) "does not bind the jury to find that the presumed fact necessarily follows the proven fact, therefore the presumption is permissive in nature." *Id.*

Although the Florida Supreme Court held that the statute in issue, and therefore the jury instruction authorized by that statute, created a permissive inference, this Court owes no deference to that interpretation. The challenged instruction in *Francis* had previously been construed by the Georgia Supreme Court to create a permissive inference. In rejecting this construction, the United States Supreme Court held: "The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning.... The federal constitutional question is whether a reasonable juror could have understood the [charge] as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." *Francis*, 105 S.Ct. at 1972.

Contrary to what the Florida Supreme Court said, the fact that a presumption does not bind a jury to find that "the presumed fact necessarily follows the proven fact" does not mean that the presumption is a permissive inference. Such a presumption could be either a permissive inference or a mandatory rebuttable presumption. The difference between the two types of presumptions is that, unlike a permissive inference, a mandatory rebuttable presumption *requires* a jury to find that the presumed fact follows the proven fact *unless* the defendant produces evidence to rebut the existence of the presumed fact.

[1] In the present case, the challenged instructions stated that the failure to spend funds properly "shall constitute prima facie evidence of intent to defraud." By using the term "shall," the instructions command the jury to find intent to defraud if the jury finds that funds were not applied directly to the project for which they were advanced and the defendant fails to produce evidence to rebut this finding. A reasonable juror thus "could have understood" the instructions to *require* the jury to find intent to defraud, *unless* the defendant produced evidence to rebut that finding. Because the instructions in the present case could be interpreted to create a mandatory rebuttable presumption, the instructions are unconstitutional. *Francis*, 105 S.Ct. at 1972.

[2] Even if the jury instructions in the present case created a permissive inference, the instructions would be unconstitutional. In *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), the Supreme Court held that the constitutionality of a permissive inference should be judged in light of the circumstances giving rise to the inference in the particular case. *Id.* at 162-63, 99 S.Ct. at 2227; *see Cosby v. Jones*, 682 F.2d 1373, 1376 (11th Cir.1982). Where the proven fact is not the only evidence of a presumed fact that is an element of an offense, a permissive inference can be upheld only if, given that the initial fact is proven, it is "more likely than not" that the presumed fact would follow. *See id.* at 1376-77. However, where the proven fact is the *sole* evidence of the presumed fact, the inference can be upheld only if, given that the initial fact is proven, the presumed fact would follow beyond a reasonable doubt. *See Ulster County Court*, 442 U.S. at 167, 99 S.Ct. at 2230.

[3] In the present case, the sole evidence of the contractor's intent to defraud was the fact that the contractor received advance payments for work on various projects and did not spend these funds on those specific projects. Under these circumstances, the inference that, because the contractor did not spend money on projects for which the money was advanced, he intended to defraud the owners must be tested by a "beyond a reasonable doubt" standard. Given the fact that material and labor costs remain unpaid after an advance of contract funds by an owner, it does not follow beyond a reasonable doubt that a contractor intends to defraud the owner. Thus, even if the presumption in the

present case created a permissive inference, the presumption would be unconstitutional.

B. Harmless Error

[4] This Court has held that the harmless error doctrine may be applicable to a *Sandstrom* error if the court can say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Davis v. Kemp*, 752 F.2d 1515, 1521 n. 7 (11th Cir.1985) (en banc) (*quoting Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). A *Sandstrom* error can be harmless beyond a reasonable doubt under two circumstances: (1) where the faulty instruction applied to an element of the crime not at issue at the trial; or (2) where evidence of guilt was "overwhelming." *Davis*, 752 F.2d at 1521. In this second situation, the court's analysis should focus on whether evidence of the presumed element (i.e., intent), rather than the more inclusive issue of *guilt*, is overwhelming. *See Tucker v. Kemp*, 762 F.2d 1496, 1502 (11th Cir.1985) (en banc).

[5] Appellant's sole defense in the present case was that he lacked intent to defraud. He claimed that he did not pay the subcontractors because he was involved in contract disputes with them. The faulty instruction, which shifted the burden of proof on intent, thus applied to an element of the crime that was contested at trial. The State offered no evidence of intent to defraud, other than the evidence which gave rise to the presumption in the present case. Under these circumstances, the evidence of appellant's intent was far from overwhelming. We cannot conclude that, beyond a reasonable doubt, the *Sandstrom* violation did not contribute to the verdict obtained. The *Sandstrom* violation was therefore not harmless error.

II. Constitutionality of Fla.Stat. § 713.34(3)

[6] Appellant also challenges the constitutionality of Fla.Stat. § 713.34(3), both as applied to him and on its face. A statute that relieves the State of the affirmative burden of proving one of the elements of an offense is analyzed in accordance with the same principles as the jury instructions that are based on that statute. *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

[7] The Florida Supreme Court has held that Fla.Stat. § 713.34(3) creates a permissive inference, and not a mandatory rebuttable presumption. *Farrari*, 398 So.2d 804. Normally, a state supreme court is the ultimate expositor of state law. *Mullaney*, 421 U.S. at 691, 95 S.Ct. at 1886. However, when a court determines whether a statute creates a mandatory rebuttable presumption or a permissive inference, the court is directly deciding the question of whether that statute comports with federal constitutional requirements. The determination of the type of presumption a state statute creates is thus a federal question subject to review by federal courts. We note that to hold otherwise would create the anomalous situation where a statute is held to be constitutional, although jury instructions that are merely a *verbatim* rendition of the statute are held to be unconstitutional.

[8] For the reasons discussed in the first part of this opinion, we conclude that Fla.Stat. § 713.34(3) creates a mandatory rebuttable presumption. We therefore hold that Fla.Stat. § 713.34(3) is unconstitutional both on its face and as applied to the defendant in the present case. *See Francis*, 105 S.Ct. at 1973.

The order of the district court denying appellant's Petition for Writ of Habeas Corpus is REVERSED.